

No. 14674

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United States  
Court of Appeals  
for the Ninth Circuit

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HOMER E. GILLESPIE, CATHERINE L.  
GILLESPIE and GILLESPIE GAMES  
COMPANY, a Corporation,

Appellants,

vs.

COMA F. NORRIS, Individually and Doing Busi-  
ness as C. F. NORRIS MANUFACTURING  
COMPANY,

Appellee.

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Transcript of Record  
In Two Volumes

Volume I  
(Pages 1 to 80)

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

JUN 20 1955



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

ERIC A. ROSE,  
ALBERT D. WHITE,  
711 F. & M. Building,  
Long Beach 12, Calif.

For Appellee:

WILLIAM C. BABCOCK,  
FREDERICK E. MUELLER,  
1203 Heartwell Bldg.,  
Long Beach 2, Calif.





In the District Court of the United States, Southern  
District of California, Central Division

Civil Action No. 16,858-W.M.

HOMER E. GILLESPIE, CATHERINE L. GIL-  
LESPIE, GILLESPIE GAMES COMPANY,  
a California Corporation,

Plaintiffs,

vs.

COMO F. NORRIS, Individually and Doing Busi-  
ness as C. F. NORRIS MANUFACTURING  
COMPANY; DOE ONE, DOE TWO, DOE  
THREE, DOE FOUR and DOE FIVE,

Defendants.

COMPLAINT FOR INFRINGEMENT OF  
U. S. LETTERS PATENT #2,595,669

Plaintiffs complain of Defendants and for cause  
of action allege:

I.

That at all times herein mentioned Plaintiffs and  
Defendants were and now are residents of the City  
of Long Beach, County of Los Angeles, State of  
California.

II.

This action arises under, and the jurisdiction of  
the Court is based upon, the Patent Laws of the  
United States of America and on the further  
ground that the acts of infringement hereinafter  
complained of were and are being committed in

the [2\*] City of Long Beach, County of Los Angeles, State of California, within this District and elsewhere within the United States.

### III.

Plaintiffs are ignorant of the true names of Does One, Two, Three, Four and Five, and whether they be corporations, associations or natural persons, and for that reason said Defendants and each of them are sued by said names as fictitious names and when Plaintiffs ascertain the true names of the Defendants then will ask leave of Court to amend this Complaint and all subsequent proceedings herein to show the true names of the Defendants and their capacities.

### IV.

That at all times herein mentioned Gillespie Games Company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and is authorized to do, and is now engaged in doing business in the State of California, with principal place of business located in the City of Long Beach, County of Los Angeles, State of California.

### V.

That at all times herein mentioned Defendant Como F. Norris was and now is doing business under the fictitious firm name and style of Como Norris Manufacturing Company, and has filed a certificate and published a notice as required by

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

Section 2466 and Section 2468 of the Civil Code of the State of California.

## VI.

That on the 11th day of October, 1948, Plaintiff, Homer E. Gillespie, being within the meaning of the statutes of the United States then in force, the original and first inventor of a certain "Disk Game Apparatus" and being entitled to a patent thereon, under the provisions of the said statutes duly filed in the United States Patent Office an application for Letters Patent, [3] being Serial No. 53776, for said invention; that thereafter the said Homer E. Gillespie assigned his entire right, title and interest in and to said application for U. S. Letters Patent to Gillespie Games Company, a California corporation, and after compliance with all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office, Letters Patent of the United States, No. 2,595,669 was duly granted to the said Plaintiff and to Gillespie Games Company, a California corporation, as assignee on said application, Serial No. 53776. That thereafter on the 23rd day of June, 1953, Gillespie Games Company, a California corporation, assigned an undivided one-half interest in and to said invention and to said Letters Patent to Plaintiff, Catherine L. Gillespie, and further assigned an undivided one-half interest in and to said invention and said Letters Patent to Plaintiff, Homer E. Gillespie, and that said U. S. Letters Patent No. 2,595,669 has always been since said

23rd day of June, 1953, and is now vested in said Plaintiff, Homer E. Gillespie, and Plaintiff Catherine L. Gillespie.

## VII.

That Plaintiff is informed and believes and on that ground alleges that said invention and improvement has been and now is of great benefit and advantage to the public and the rights of Plaintiff under said Letters Patent have been generally accepted and acquiesced in.

## VIII.

That Defendants, and each of them, have within the last six years and prior to the filing of this complaint and subsequent to said date of issue of said Letters Patent, to wit: the 6th day of May, 1952, infringed the said Letters Patent and continue to so infringe by making or causing to be made, selling or causing to be sold and using or causing to be used, within this District and [4] elsewhere within the United States Disk Game Apparatus made in accordance and embodying the invention as disclosed and claimed in said Letters Patent, wilfully and without the consent of the Plaintiffs.

## IX.

That Plaintiffs have notified Defendants in writing, on the 22nd day of September, 1948, of their said acts of infringement and requested them to desist, but nevertheless Defendants have refused and neglected to desist and have disregarded such notice and such request and continue to infringe



under said U. S. Letters Patent No. 2,595,669, and threaten to continue to so infringe.

X.

That Defendants have derived unlawful gains and profits from such infringement which Plaintiffs would otherwise have received but for such infringement and Plaintiffs have thereby been caused irreparable damages.

XI.

That Plaintiffs have regularly and continuously marked all their patented apparatus sold or used by them with the notice of Letters Patent owned by them or application pending in the U. S. Patent Office, in full compliance with the United States statutes relating to marking of patented articles for which U. S. Letters Patent have been applied for. Wherefore, Plaintiff prays:

1. For an injunction restraining Defendants and each of them, their officers, agents, servants and employees from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any Disk Game Apparatus or skill game apparatus made in accordance with or embodying the [5] inventions of U. S. Letters Patent No. 2,595,669 or from infringement upon or violating the said Letters Patent in any way whatsoever;

2. For an accounting of profits from the 22nd day of September, 1948, to date and damages; that said profits and damages to be paid by Defendants and each of them be trebled in view of the wilful and deliberate nature of the infringement;

3. That each and all of the infringing devices which are in the possession of, or under the control of the Defendants, and each of them be delivered into Court for such final disposition as to the Court may seem just and proper;

4. For reasonable attorneys' fees; for costs of suit incurred herein, and for such other and further relief as to the Court may seem meet and just.

ERIC A. ROSE and  
ALBERT D. WHITE,  
Attorneys for Plaintiffs;

By /s/ ERIC A. ROSE.

Duly verified.

[Endorsed]: Filed June 19, 1954. [6]

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant, Como F. Norris, individually and doing business as C. F. Norris Manufacturing Company, and for answer to plaintiffs' complaint herein, admits, denies and alleges as follows:

#### I.

Answering paragraph II of said complaint, defendant admits the jurisdiction of the Court, but defendant denies that he is now committing or has ever in the past committed any act of patent infringement as alleged in said complaint in this dis-

strict or elsewhere giving plaintiffs any cause of action under the Patent Laws of the United States of America.

II.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the [8] allegations contained in paragraph IV of the complaint.

III.

Defendant admits the allegations contained in paragraph V of the complaint.

IV.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the complaint except that defendant denies that said patent was duly or legally issued.

V.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the complaint.

VI.

Defendant denies generally and specifically each and every allegation of paragraph VIII of the complaint.

VII.

Defendant denies each and every allegation contained in paragraph IX of the complaint except that defendant admits that he has received written notice of infringement.

## VIII.

Defendant denies generally and specifically the allegations contained in paragraph X of the complaint.

## IX.

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XI of the complaint.

As Further, Separate and Affirmative Defenses, Defendant Alleges:

## X.

That United States Letters Patent No. 2,595,669 and every claim thereof is invalid because: [9]

A. The subject matter claims therein and all material and substantial parts thereof had, long prior to the alleged invention by plaintiff, Homer E. Gillespie, or more than one year to application therefor, been described in United States Letters Patent, Foreign Letters Patent, and printed publications including the following:

Patentee	Patent No.	Date
Forrest .....	890,897	6/16/08
Fulton, et al.....	1,008,898	11/14/11
Verral .....	1,190,488	7/11/16
Williams .....	1,706,271	3/19/29
Williams .....	1,806,274	5/19/31
Rather .....	1,866,821	7/12/32
Weber .....	2,248,316	7/ 8/41



B. The subject matter claimed in said patent, and all material and substantial parts thereof, had, long prior to the alleged invention thereof by the applicant for said patent, been known and used in the United States by many others, including the applicants and assignees of the patents listed in Paragraph A above, at the addresses set forth in said patents, and by the authors and publishers of and the persons mentioned in the publications listed in said Paragraph A at the addresses set forth in said publications.

C. The subject matter claimed in said patent and all material and substantial parts thereof, had, long prior to the alleged invention thereof by the applicant for said patent or more than one year prior to his application therefor, been in public use or on sale in the United States by said applicant and his assignees, by the applicants and assignees of the patents listed in Paragraph A above at the addresses set forth in said patents, by the authors and publishers of and the persons mentioned in the publications, and by many other persons whose names and addresses are at present unknown to defendant. [10]

D. Each and every element and feature disclosed and claimed in said patent as well as the use, function and effect thereof, both singly and in divers associations and combinations, was well known in the art long prior to the alleged invention thereof by the applicant for said patent, and the conception and production of the alleged invention

claimed in said patent was nothing more than the exercise of the ordinary and expected skill of persons familiar with the art to which said patent relates.

E. The alleged invention claimed in said patent is not a patentable combination, but is a mere aggregation of elements and parts which do not cooperate in any new or unexpected way or produce any new or unexpected result, or any old result in a new or more facile manner.

F. Said claims do not comply with the provisions of R. S. 4888 (35 U.S.C.A. 33) in that:

(1) Neither the alleged invention claimed in said patent nor the manner or process of making, constructing or using the same are described in said patent in such full, clear, concise or exact terms as to enable a person skilled in the art or science to which said alleged invention appertains or with which it is most closely connected, to make, construct, or use the same, nor is the principle thereof explained so as to distinguish it from other inventions.

(2) None of the claims particularly point out or distinctly claim the part, improvement or combination which the applicant for said patent claimed as his invention or discovery.

G. The applicant for said patent abandoned the alleged invention disclosed and claimed in said patent.

H. The invention claimed in said patent is sub-

stantially different from any indicated, suggested, described or claimed [11] in the original application therefor.

I. The subject matter thereof was not the sole invention of the applicant for said patent, but was the joint invention of said applicant and another, which fact was well known to said applicant at the time he filed said application.

J. Said claims were so limited by requirements of the Commissioner of Patents during the prosecution of said patent as not to be susceptible of a construction which will include any device or apparatus which has been or is now being made, used or sold by defendant.

K. That prior to the issuance of said patent, the apparatus claimed therein had been disclosed and claimed in a prior United States Letters Patent by plaintiff, Homer E. Gillespie, the number of which is unknown at present to defendant.

## XI.

That plaintiffs come into Court with unclean hands and are precluded from any equitable relief whatsoever.

By Way of Counter-Claim Against Plaintiffs, the Defendant Alleges:

## XII.

That said patent No. 2,595,669 and each and every claim thereof is invalid for the reasons heretofore set forth in paragraph X of this Answer, and de-

defendant repleads and incorporates said paragraph herein by reference to the same as though herein set forth in full.

### XIII.

That no device or structure made, used or sold by the defendant prior to the filing of the complaint herein infringes any claim of said patent.

### XIV.

That plaintiffs have notified defendant and have alleged in their complaint herein that said patent is valid and infringed [12] by defendant, and, therefore, there is a controversy existing between plaintiffs and defendant in this action, which, under 28 U.S.C. 2201, is cognizable by this Court and should be litigated as a counter-claim in this action.

### XV.

That plaintiffs have conspired and entered into agreements with persons at present unknown to defendant to use the patent in suit to unlawfully restrain trade and competition, all in contravention of the law and against public policy. That said acts of plaintiffs constitute misuse of said patent, unfair trade practices, and unfair competition against defendant to his irreparable damage.

Wherefore, defendant prays:

1. That Patent No. 2,595,669 and each and every claim thereof be adjudged invalid;
2. That the defendant be adjudged not to have infringed said Letters Patent or any claim thereof;
3. That plaintiffs be adjudged not entitled to any relief against the defendant and be prohibited



from enforcing said patent against the defendant because of plaintiffs' use of said patent contrary to law and public policy, and because plaintiffs come into Court with unclean hands;

4. That the complaint on file herein be dismissed with costs of suit to defendant, including his attorneys' fees incurred herein;

5. That defendant be awarded three-fold damages by him sustained;

6. For such other and further relief as this Court shall deem just and proper.

Dated at Long Beach, California, this 28th day of July, 1954.

/s/ WILLIAM C. BABCOCK,  
Attorney for Defendant Como  
F. Norris.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 29, 1954. [13]

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[Title of District Court and Cause.]

DEFENDANTS' INTERROGATORIES  
TO PLAINTIFF

To Eric A. Rose and Albert D. White, Attorneys  
for Plaintiff, 711 F & M Building, Long Beach  
12, California:

The defendant requests that the plaintiff, Homer E. Gillespie, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Please list each of the claims in United States Letters Patent No. 2,595,669 that plaintiffs allege defendant has infringed by:

(a) Manufacturing devices embodying the alleged invention claimed in said patent.

(b) Selling devices embodying the alleged invention claimed in said patent.

(c) Using devices embodying the alleged invention claimed in said patent. [19]

2. If the answers to Interrogatories 1(a), 1(b) or 1(c) Claim 1, will you urge at the trial that the claim should be construed sufficiently broad that the element, "a horizontal playing field having targets," specified therein, includes a playing field having a shape other than the circular shape shown in Figures 1 and 3 of the patent in suit?

3. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the element, "and means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, includes other than a horizontally disposed sweep means extending completely over the playing field and operatively attached to a vertical shaft.

4. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the claim should be construed sufficiently broad that the element, "a horizontal playing field having targets," specified therein, includes a playing

field having a shape other than the circular shape shown in Figures 1 and 3 of the patent in suit.

5. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the element, "and means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, includes other than a horizontally disposed sweep means extending completely over the playing field and operatively attached to a vertical shaft?

6. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claims 11, 12, 13 or 14, will you urge at the trial that the element, "a playing field including targets," specified therein, includes a playing field having a shape other than the circular shape shown in Figures 1 and 3 of the patent?

7. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the claim should be construed sufficiently broad that the elements, "a horizontal [20] playing field having targets," and "means for displacing the playing pieces from the playing field at the conclusion of a game," specified therein, would include:

(a) A horizontal rectangular playing field having targets thereon.

(b) A transversely disposed bar that may be moved longitudinally over said rectangular field to remove disc-like playing pieces therefrom.

8. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 2, will you urge at the trial that the claim should be construed sufficiently broad that the elements, "a horizontal playing field having targets," and "horizontally disposed sweep means extending completely over the horizontal playing field for removing the playing pieces from the playing field at the conclusion of a game," specified therein would include:

(a) A horizontal rectangular playing field having targets thereon.

(b) A transversely disposed bar that may be moved longitudinally over said rectangular field to remove disc-like playing pieces therefrom.

9. If the answers to Interrogatories 1(a), 1(b) or 1(c) is Claim 1, will you urge at the trial that the claims should be construed sufficiently broad that the element, "and means for displacing the playing pieces from the playing field specified therein," would include:

(a) A transversely disposed bar that is moved manually over a horizontal playing field to remove the playing pieces therefrom.

(b) A rectangular playing field, formed of two smaller rectangular segments, with the segments pivotally supported whereby they may pivot downwardly and away from one another to cause playing pieces [21] disposed thereon to drop downwardly there between, and



said segments being moved downwardly and away from one another and returned to said horizontal position by manual effort only.

10. At what dates did Homer E. Gillespie:

- (a) Conceive.
- (b) Make the first drawing.
- (c) Make the first model of said alleged invention.
- (d) Have the first model of said alleged invention made.

as defined in Claims 1, 2, 3, 11, 12, 13, 14 of said patent.

11. Did Homer E. Gillespie have anyone assist him in:

(a) Conceiving the structural details of each element in the combination of elements that form said alleged invention.

(b) Conceiving the structural detail of any element in the combination of elements that form said alleged invention.

(c) Making the first drawing of the elements which in combination form said alleged invention.

(d) Making the first drawing of each element in said combination that form said alleged invention.

(e) Make the first model in which the elements were combined to form said alleged invention.

(f) Make each of the elements that could be combined to form said alleged invention.

as defined in Claims 1, 2, 3, 11, 12, 13 and 14 of said patent.

12. If the answer to any one of the Interrogatories 11(a), (b), (c), (d), (e), (f) is "yes," please state the name or names of such person or persons, and their present address.

13. Did Homer E. Gillespie prior to October 11, 1948, [22] have anyone:

(a) Explain the manner in which.

(b) Make drawing of the manner in which.

(c) Make parts that could be assembled to provide.

(d) Assemble parts to provide the.

combination of elements specified in Claims 1, 2, 3, 11, 12, 13 and 14 to provide said alleged invention defined therein.

14. If the answer to Interrogatories 13(a), (b), (c), or (d) is "yes," please state the name of said person or persons and their present addresses.

15. Did Homer E. Gillespie ever:

(a) Use.

(b) Publicly use.

(c) Permit other persons to use.

(d) Permit other persons to use publicly.

(e) Manufacture.

(f) Permit other persons to manufacture.

(g) Sell.

(h) Permit other persons to sell.

said alleged invention as defined in Claims 1, 2, 3, 11, 12, 13 or 14 of said patent prior to October 11, 1948.

16. If the answer to Interrogatories 15(a), (b), (c), (d), (e), (f), (g) or (h) is "Yes," please state the names and addresses of such person or persons.

17. Will Plaintiffs at the trial urge that:

- (a) Claim 1.
- (b) Claim 2.
- (c) Claim 3.
- (d) Claim 11.
- (e) Claim 12.
- (f) Claim 13.
- (g) Claim 14. [23]

are sufficiently broad to cover games having "playing fields" of any shape?

18. Will Plaintiffs at the trial urge that the patent in suit:

- (a) Illustrates.
- (b) Describes.
- (c) Claims.

a sweep means other than a vertical rotatable shaft from which a substantially horizontal arm projects that may support various forms of playing surface engaging members that are adapted to sweep playing pieces from said surface.

19. Will Plaintiffs at the trial urge that the sweep means:

- (a) Illustrated.
- (b) Described.
- (c) Claimed.

in the patent in suit is able to remove all playing pieces from a playing surface by said sweep means sweeping over the entire area of said surface, when said surface is of a shape other than circular?

20. Will Plaintiffs at the trial urge that the alleged invention in:

- (a) Claim 1.
- (b) Claim 2.
- (c) Claim 3.
- (d) Claim 11.
- (e) Claim 12.
- (f) Claim 13.
- (g) Claim 14.

is defined by a combination of elements, in which one of said elements is a playing surface of non-circular shape?

21. Did Gillespie Games Company, a [24] corporation, through its attorney, Mr. Eric Rose, in an amendment, dated August 20, 1951, to obtain an allowance of claims in the patent in suit make the statement:

“Weber’s invention will not accomplish that purpose, and if Weber’s idea be used on Forrest’s device, the purpose of completely covering the playing field could not be accomplished, because the particular construction claimed by applicant is suit-

able on a circular field only which does not extend beyond a circular area''?

22. Will Plaintiffs at the trial contend that the representation made to the Patent Office in said amendment, dated August 20, 1951, by Mr. Eric Rose and quoted in Interrogatory No. 21 was subsequently:

- (a) Withdrawn.
- (b) Denied.

in the prosecution of the patent application, Serial No. 53,776, that matured into the patent in suit?

23. Do Plaintiffs at the present time have:

- (a) Personal knowledge.
- (b) Witness who would testify under oath.
- (c) Affidavit.
- (d) Written evidence.
- (e) Pictorial evidence.
- (f) Evidence of any kind.

of a single use, sale, or manufacture of a device by the Defendant since May 6, 1952, by which Claims 1, 2, 3, 11, 12, 13, 14 would be infringed, if the playing field specified in said claims is limited to a field of circular shape.

24. Did Homer E. Gillespie know on October 11, 1948, when he filed for the patent in suit that a penny pitch embodying all of the structural features shown on the attached photographs, which have been designated Exhibits "A," "B," and "C," was built



and [25] publicly used by Defendant during the year 1946. Said structural features are identified, for clarity, on said exhibits by letters, which letters identifying said features are as follows:

- A. Rectangular playing field.
- B. Targets marked on said field.
- C. Walls extending upwardly from edges of said field.
- D. Horizontal launching platforms extending outwardly from the upper edges of said walls.
- E. Horizontal transparent glass cover that extends over inner edge portions of said platforms.
- F. Spacers that maintain said cover a slight distance above said inner platform edge portions.
- G. Slits defined by said cover and inner platform edge portions through which flat playing piece may be trajected onto said playing field in an endeavor to locate said piece on one of said targets.
- H. Transversely disposed bar that may be moved longitudinally over the entire area of said playing surface to remove playing pieces therefrom, (in red).
- I. Lever to manually move said bar over area of playing field to remove playing pieces therefrom.

25. Said Patent No. 2,595,667 refers to a co-pending application Serial No. 756,523 for a skill game. State the date of said application.

26. Has application Serial No. 756,523 for a skill game resulted in the issuance of a patent, and if so what is the date of said patent, its title, and the serial number of said patent?

27. If the answer to Interrogatory 26 is "no," has the application been abandoned?

28. If the answer to Interrogatory 27 is "yes," what is the date of said abandonment? [26]

29. Referring to Paragraph 11 of the complaint, on what date did Plaintiffs or any of them commence placing the required statutory notice on articles sold by them or any of them embodying the alleged invention Letters Patent 2,595,669?

Please take notice that a copy of such answers must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

Dated: September . . , 1954.

/s/ WILLIAM C. BABCOCK,

Attorney for Defendant, Coma  
F. Norris.

[Exhibits A, B, and C. See pages 99, 100, 101, of the Book of Exhibits.]

[Endorsed]: Filed September 4, 1954. [27]

[Title of District Court and Cause.]

## REQUEST FOR ADMISSION OF FACTS

To Eric A. Rose and Albert D. White, Attorneys for  
Plaintiff, 711 F & M Building, Long Beach 12,  
California:

Please Take Notice that the Defendants hereby request the Plaintiff Homer E. Gillespie, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within ten (10) days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. That the drawings in the patent in suit show only a circular playing field.

2. That the drawings in the patent in suit show only a vertical rotatable shaft, a substantially horizontal arm extending outwardly from said shaft, and said arm supporting various [32] members that slidably engage the playing surface with a sliding motion to displace playing pieces therefrom, as the "means for displacing the playing pieces" and "sweep means" specified in Claim 1 and Claims 2 and 3 thereof.

3. That a vertical rotatable shaft, a substantially horizontal arm extending outwardly from said shaft, and said arm supporting various members that may slidably engage a playing surface, would only be operative to slidably contact the entire area of a



playing surface to remove playing pieces therefrom when said playing field is of a circular shape.

4. That the shape of the playing field is not defined in Claims 1, 2, 3, 11, 12, 13, 14.

5. That the Gillespie Games Company, a corporation, through its attorney, Eric A. Rose, in an amendment dated August 20, 1951, to obtain an allowance of claims in the patent in suit made the statement:

“Weber’s invention will not accomplish that purpose, and if Weber’s idea be used on Forrest’s device, the purpose of completely covering the playing field could not be accomplished, because the particular construction claimed by applicant is suitable on a circular field only which does not extend beyond a circular area.”

6. That the Plaintiffs obtained title to the patent in suit from Gillespie Games Company.

7. That the Plaintiffs as assignees of the patent in suit are bound by all commitments and limitations made by Mr. Eric A. Rose in obtaining the claims allowed on the alleged invention.

8. That Claims 1, 2, 3, 11, 12, 13 and 14 as a result of said representation made by Mr. Eric A. Rose are limited to an interpretation in which the playing field element in the combination of elements in each claim that defines the alleged invention is [33] of a circular shape.

9. That any novelty to the broad combination of a:

(a) Rectangular horizontal playing surface with targets thereon.

(b) Four walls extending upwardly therefrom to protect the surface.

(c) Means to remove playing pieces from the playing surface.

(d) Slits through which playing pieces may be discharged onto said playing surface.

is disclosed in the W. E. Andrews patent entitled Game Device No. 2,160,349 that issued May 30, 1939, a copy of which is attached hereto.

10. That the disclosures in said Andrews patent were not considered by the Patent Office during the prosecution of the patent in suit.

11. That said Andrews patent issued more than one year prior to the date Homer E. Gillespie filed his application for the patent in suit.

12. That any novelty to the broad combination of a:

(a) Horizontal playing field.

(b) Protective walls around said playing surface.

(c) Launching platform for flat playing pieces disposed above said playing field and outwardly therefrom.

is disclosed in the C. T. Dorsey patent No. 725,684

that issued April 21, 1903, a copy of which is attached hereto.

13. That said Dorsey patent issued more than one year prior to the date Homer E. Gillespie filed his application for the patent in suit.

14. That the disclosures in said Dorsey patent were not considered in the prosecution of the patent in suit.

15. That Defendant had for more than one year prior to [34] the date Homer E. Gillespie applied for the patent in suit publicly used a penny pitch that included:

(a) A horizontal rectangular playing field on which targets were marked.

(b) Walls extending upwardly from said field to prevent access thereto.

(c) Horizontal platforms extending outwardly from the upper edges of said walls.

(d) A rectangular transparent sheet that extends over the inner edge portions of said platforms.

(e) Spacers that hold said sheet above said platforms to cause said sheet to define slits therewith through which flat playing pieces may be trajected onto the playing field.

(f) A transversely disposed bar that may be moved over the entire surface of said playing field to remove playing pieces therefrom.

16. That the novelty in Claims 1, 2, and 3 of the patent in suit is the combination of a circular playing field with targets, rotatable sweep means that slidably contact the entire area of said field to remove playing pieces therefrom with each rotation thereof, and the old element of an elevated playing piece launching platform and cover glass to define a slit through which playing pieces may be trajected onto said playing surface.

17. That Plaintiffs at the present time have no:

- (a) Personal knowledge.
- (b) Witnesses who would testify under oath.
- (c) Affidavit.
- (d) Written evidence.
- (e) Pictorial evidence.
- (f) Evidence of any kind.

of a single use, sale or manufacture of a device by the Defendant [35] since May 6, 1952 by which Claims 1, 2 and 3 when limited to a circular playing field and rotatable playing piece displacing means would be infringed.

18. That Plaintiffs at the present time have no:

- (a) Personal knowledge.
- (b) Witnesses who would testify under oath.
- (c) Affidavit.
- (d) Written evidence.
- (e) Pictorial evidence.
- (f) Evidence of any kind.

of a single use, sale or manufacture of a device by the Defendant since May 6, 1952, by which Claims 1, 2 and 3 when limited to a circular playing field would be infringed.

19. That the plaintiff, Homer E. Gillespie, in his application for Patent No. 2,595,669 in his First Amendment to said application, said amendment dated June 13, 1949, made the following statement, "Applicant is not claiming broadly the combination of a missile launching means, the playing surface and a sweep."

Dated: September . ., 1954.

/s/ WILLIAM C. BABCOCK,  
Attorney for Defendant.

[W. E. Andrews Patent No. 2,160,349 is set out in full, pages 82 to 84 of the Book of Exhibits.]

[C. J. Dorsey Patent No. 725,684 is set out in full, pages 86 to 88 of the book of Exhibits.]

Receipt of Copy acknowledged.

[Endorsed]: Filed September 4, 1954. [36]



[Title of District Court and Cause.]

ANSWER TO DEFENDANTS'  
INTERROGATORIES TO PLAINTIFFS

To William C. Babcock and Frederick E. Mueller,  
Attorneys for Defendant Como F. Norris, 1203  
Heartwell Building, Long Beach, California:

The following are the answers of the plaintiff  
Homer E. Gillespie to the interrogatories numbered  
1 to 29, directed to the plaintiff to be answered pur-  
suant to Rule 33:

Answer to interrogatory No. 1:

Claims 1, 2, 11, 12, 13 and 14.

Answer to interrogatory No. 2:

Yes.

Answer to interrogatory No. 3:

Yes.

Answer to interrogatory No. 4:

Yes.

Answer to interrogatory No. 5:

Yes. [44]

Answer to interrogatory No. 6:

Yes.

Answer to interrogatory No. 7:

Yes.

Answer to interrogatory No. 8:

Yes.

Answer to interrogatory No. 9:

Yes.

Answer to interrogatory No. 10:

- (a) Approximately September 19, 1946.
- (b) Approximately April 5, 1947.
- (c) October, 1946.
- (d) Same as c.

Answer to interrogatory No. 11:

- (a) No.
- (b) No.
- (c) Yes.
- (d) Yes.
- (e) Yes.
- (f) No.

Answer to interrogatory No. 12:

Dean Gill, 4208 Tulane Avenue, Long Beach,  
California.

Answer to interrogatory No. 13:

Plaintiff does not understand the question.

Answer to interrogatory No. 14:

See answers to interrogatories Nos. 11 and 12.

Answer to interrogatory No. 15:

- (a) Yes.
- (b) Yes.
- (c) Yes.
- (d) Yes.
- (e) Yes.
- (f) No. [45]
- (g) Yes.
- (h) Yes.

Answer to interrogatory No. 16:

Defendant and Sicking Distributing Company, Los Angeles, California.

Answer to interrogatory No. 17:

Yes.

Answer to interrogatory No. 18:

(a) No.

(b) No.

(c) Yes.

Answer to interrogatory No. 19:

(a) No.

(b) No.

(c) Yes.

Answer to interrogatory No. 20:

Yes.

Answer to interrogatory No. 21:

Yes, if restricted and limited to the sweep means illustrated only.

Answer to interrogatory No. 22:

No.

Answer to interrogatory No. 23:

It is my understanding that defendant uses and has used, and manufactures and has manufactured rectangular fields only.

Answer to interrogatory No. 24:

The premise is untrue, no such machine was built or publicly used during 1946.

Answer to interrogatory No. 25:

June 23, 1947.



Answer to interrogatory No. 26:

No. [46]

Answer to interrogatory No. 27:

Yes.

Answer to interrogatory No. 28:

July 10, 1952.

Answer to interrogatory No. 29:

“Patent pending” was placed upon all machines used or sold publicly since June 23, 1947. No machines were manufactured since issuance of patent.

/s/ HOMER E. GILLESPIE.

Subscribed and sworn to before me this 8th day of October, 1954.

[Seal]      /s/ ERIC A. ROSE,

Notary Public in and for the County of Los Angeles,  
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 9, 1954. [47]

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[Title of District Court and Cause.]

## RESPONSE TO REQUEST TO ADMISSION

Plaintiff Homer E. Gillespie makes the following admissions and denials on the Request for Admission served on the defendant by plaintiff:

Request 1:

Admitted.

Request 2:

Admitted if confined to sweep means only,  
otherwise denied.

Request 3:

Admitted.

Request 4:

Admitted.

Request 5:

Admitted if confined to sweep means, other-  
wise denied.

Request 6:

Denied. [49]

Request 7:

Admitted if confined to Patent Office actions,  
otherwise denied.

Request 8:

Denied.

Request 9:

Denied if applied to the patent involved in  
the instant case.

Request 10:

Admitted.

Request 11:

Admitted.

Request 12:

Denied if applied to the patent involved in the instant case.

Request 13:

Admitted.

Request 14:

Admitted.

Request 15:

Denied. Reference is made to the parent application being serial number 756523, filed June 23, 1947.

Request 16:

Denied.

Request 17:

Admitted.

Request 18:

Denied. (The undersigned is unable to understand the request for admission except for matters covered in Request 17.)

Request 19:

Denied. [50]

For clarification, the passage of the amendment apparently alluded to states correctly as follows:

“The rejection of Claims 1 to 11 on the grounds of an old combination is believed to be erroneous because applicant is not claiming broadly the combination of a missile-launching means, a playing surface, and a sweep. Applicant, in Claims 1 to

7, is claiming a particular structure in which a disk-like playing piece is trajected from a launching platform disposed a sufficient distance above the playing field so that the disk falls upon the selected target on the playing field, assuming that the skill of the operator is sufficient to put the playing piece through the correct trajectory to fall upon the selected spot. There is no rolling or sliding of the playing pieces. They are trajected from the platform through the air, as indicated in each of the claims. This distinguishes the applicant's type of game from the broad classification set up by the Examiner in the broad terms of a missile-launching means, a playing surface and a sweep. The entirely different disposition of the launching platform, well above the playing field so that the skill of the operator in launching the playing pieces through the air determines the position where the playing piece rests on the field, makes this a new arrangement in which a new method of operation results."

/s/ HOMER E. GILLESPIE.

Subscribed to and Sworn to before me this 8th day of October, 1954.

[Seal]      /s/ ERIC A. ROSE,  
Notary Public in and for County of Los Angeles,  
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 9, 1954. [51]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT  
OR TO DISMISS

Defendants move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the Defendants' favor dismissing the complaint and for the relief demanded in defendants' counter-claim, on the ground that there is no genuine issue as to any material fact and the defendants are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) 35 U. S. C. S 102.
- (b) Affidavit of Ella Striegel.
- (c) Affidavit of Harold A. Ludwig.
- (d) Affidavit of Victor A. Murray.
- (e) Affidavit of Basil E. Norris.
- (f) Affidavit of William C. Babcock.
- (g) Affidavit of Coma F. Norris. [53]

together with defendants' Memorandum in Support of said Motion for Summary Judgment, filed and served herewith, and the records and files of the above-entitled cause.

In the alternative, defendants move the Court for an order striking out plaintiffs' complaint and dismissing the action with prejudice and with costs to defendants upon the ground that on September 2, 1954, defendants duly served on plaintiffs interrogatories pursuant to Rule 33 of the Federal



Rules of Civil Procedure, which interrogatories are now on file in the office of the Clerk of this Court; that more than fifteen days have elapsed and plaintiffs have wilfully failed to answer or object to said interrogatories.

WILLIAM C. BABCOCK,  
FREDERICK E. MULLER,

By/ s/ WILLIAM C. BABCOCK,  
Attorneys for Defendants.

[Endorsed]: Filed October 16, 1954. [54]

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[Title of District Court and Cause.]

AFFIDAVIT IN PROOF OF  
ADMISSION OF FACTS

State of California,  
County of Los Angeles—ss.

William C. Babcock, being duly sworn, deposes and says:

1. That he is one of the attorneys for defendants herein;

2. That on September 2, 1954, pursuant to affiant's direction, a request for admission of facts pursuant to Rule 36 of the Federal Rules of Civil Procedure was served upon Eric A. Rose, attorney for the plaintiffs. On September 6, 1954, a copy of said request for admission was filed with the Clerk of this Court, together with proof of service thereof.

A copy of said request is attached hereto, marked Exhibit 1.

3. No denial, admission, or other answer to said request has been served upon affiant or upon any other person authorized [55] to receive such answers on behalf of defendants by said attorney for plaintiffs or by any other person. More than ten days have elapsed since the service of said request for admission pursuant to Rule 36.

/s/ WILLIAM C. BABCOCK.

Subscribed and Sworn to before me this 12th day of October, 1954.

[Seal]      /s/ ALICE M. McCULLOUGH,  
Notary Public in and for  
Said County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [56]

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[Title of District Court and Cause.]

AFFIDAVIT OF HAROLD A. LUDWIG

State of Nevada,  
County of Clark—ss.

Harold A. Ludwig being duly sworn, deposes and says:

That during the years 1946 and 1947, affiant was employed by the owners of Virginia Park, situated

in the City of Long Beach, State of California, as business manager of this property;

That Virginia Park is an area located on the ocean front in downtown Long Beach, through which extends a thoroughfare lined with concessions, rides, and various places of amusement, said thoroughfare being known as The Pike;

That a portion of affiant's duties as business manager of said Virginia Park involved the renting and supervising of concessions, rides, and places of amusement along the portion [62] of said Pike extending therethrough;

That in 1946, no later than August of that year, affiant was approached by Coma F. Norris for permission to place a penny pitch in the center of a portion of said Pike;

That affiant gave said Coma F. Norris tentative permission to place said penny pitch in such location, but on the condition that said permission could be revoked at any time;

That affiant inspected said penny pitch after it was installed by Coma F. Norris on said Pike in Virginia Park, and witnessed and observed it while in operation on numerous occasions in connection with affiant's duties as business manager, with particular reference as to whether the installation thereof was advantageous or detrimental to the operation of the Virginia Park area;

That affiant, as a result of said inspection and

numerous observations, knows that said penny pitch was in the form of an elongate rectangular box that has a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score; [63]

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are iden-

tified as Exhibits "A," "B" and "C," and made a part hereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B" and "C," and identified by the numeral 4;

That said slit-like opening defined by said cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5;

That after said penny pitch had been installed approximately four months on the portion of said Pike extending through Virginia Park, affiant found that it was not advantageous to the Virginia Park property to have this installation continue, and affiant notified Coma F. Norris to immediately remove same from said property;

That Coma F. Norris did remove said penny pitch from said property in compliance with affiants' order.

/s/ HAROLD A. LUDWIG.



Subscribed and Sworn to before me this 2nd day  
of Sept., 1954.

[Seal]      /s/ ROBERT M. CALLISTER,  
Notary Public in and for Said  
County and State.

My Commission expires January 3, 1955.

[Endorsed]:    Filed October 16, 1954. [64]

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[Title of District Court and Cause.]

### AFFIDAVIT OF VICTOR A. MURRAY

State of California,  
County of Los Angeles—ss.

Victor A. Murray being duly sworn, deposes and  
says:

That during the year 1946 he was in the business  
of doing cabinet work and other carpentering as an  
independent operator in the City of Long Beach,  
State of California;

That on or about the 1st of March, 1946, a Coma  
F. Norris approached him to build a penny pitch,  
which Mr. Norris informed affiant would be used  
on The Pike in Long Beach;

That Mr. Norris at the time of requesting affiant  
to build said penny pitch, supplied affiant with  
material and rough sketches showing a specific

structure that Mr. Norris desired embodied in said penny pitch;

That affiant within the following two months built [68] said penny pitch for Mr. Norris and delivered said penny pitch to him, and on May 7, 1946, was paid for said labor in building said penny pitch by a check in the amount of \$175.00 given to affiant by Mr. Norris, which check is attached hereto and identified as Exhibit "D" and made a part hereof;

That affiant, as a result of said construction, knows that said penny pitch was in the form of an elongate rectangular box that has a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, with said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected there-

through onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B" and "C," and made a part hereof; [69]

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B" and "C," and identified by the numeral 4;

That said slit-like opening defined by said cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5.

/s/ VICTOR A. MURRAY.

Subscribed and Sworn to before me this 19th day of August, 1954.

[Seal]      /s/ ALICE M. McCULLOUGH,  
Notary Public in and for Said  
County and State.

My Commission Expires June 17, 1957.

[Exhibits A, B, C, and D, see pages 99, 100, 101, 102 of the Book of Exhibits.]

[Endorsed]: Filed October 16, 1954. [70]

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[Title of District Court and Cause.]

### AFFIDAVIT OF BASIL E. NORRIS

State of California,  
County of Los Angeles—ss.

Basil E. Norris being duly sworn, deposes and says:

That he is the brother of Coma F. Norris, the defendant in this action;

That between August and November of 1946, he operated a penny pitch located in that portion of the Pike that extends through Virginia Park, in the City of Long Beach, State of California, for said defendant, and as a result of said operating, knows that the structure of said penny pitch embodied an elongate rectangular box that has a bottom, the upper surface of which bottom is subdi-



vided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. [75] Each successful placing of a penny within the confines of one of said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B," and "C," and made a part hereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;



That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C," and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B," and "C," and identified by the numeral 4;

That said slit-like opening defined by said [76] cover and said platform is shown in Exhibits "A" and "B" and identified by the numeral 5.

/s/ BASIL E. NORRIS.

Subscribed and sworn to before me this 9th day of July, 1954.

[Seal]      /s/ ALICE M. McCULLOUGH,  
Notary Public in and for Said  
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [77]

[Title of District Court and Cause.]

AFFIDAVIT OF COMA F. NORRIS

State of California,  
County of Los Angeles—ss.

Coma F. Norris, being duly sworn, deposes and says:

That affiant is the defendant in the above-captioned action;

That affiant has personal knowledge of the matters hereinafter referred to and makes this affidavit in support of defendants' Motion for Summary Judgment;

That affiant has carefully read and studied a copy of United States Letters Patent No. 2,595,669 entitled "Disk Game Apparatus," issued May 6, 1952, to Gillespie Games Company, a corporation of California, and he fully comprehends the alleged invention disclosed therein;

That affiant is familiar with game devices of the general [81] type represented by the alleged invention disclosed in said patent, inasmuch as he has made, used or sold similar game devices for at least the past eight (8) years, and prior to 1946;

That since May 6, 1952, the issue date of said patent, affiant has not made, used or sold game devices of the type disclosed in said patent in which the playing field is circular in shape, or in which the means for displacing playing pieces from said

field is a horizontal sweep pivotally mounted at the center of said field to a rotatable shaft that permits rotation of said sweep to displace playing pieces from said field.

That affiant has not, since May 6, 1952, made, used or sold a game device which can be included within the scope of any of the claims of said patent, if said claims be interpreted to embody the limitation of a playing field which is circular.

/s/ COMA F. NORRIS.

Subscribed and sworn to before me this 7th day of October, 1954.

/s/ ALICE M. McCULLOUGH,  
Notary Public in and for Said  
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed October 16, 1954. [82]

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[Title of District Court and Cause.]

### AFFIDAVIT OF ELLA STRIEGEL

State of California,  
County of Los Angeles—ss.

Ella Striegel being duly sworn, deposes and says:

That during the year 1946 she was employed by Coma F. Norris for a period of approximately one month to operate a penny pitch that was located

on that portion of The Pike in the City of Long Beach, State of California, that extends through an area known as Virginia Park;

That affiant as a result of her operation of said penny pitch, knows that the structure of said device was in the form of an elongate rectangular box that had a bottom, the upper surface of which bottom is subdivided into a number of squares that serve as targets on which patrons of the device seek to traject pennies. Each successful placing of a penny within the [83] confines of one said square targets results in the patron winning a number of pennies, the quantity of which is determined by a numeral marked on said bottom surface within said square;

That said penny pitch box was formed with four side walls, three of which terminate on their upper edge portions in horizontally situated platforms;

That said penny pitch box has a transparent cover horizontally disposed across the top thereof, said cover so supported relative to said platforms as to define a continuous narrow slit-like opening therewith, and said opening permitting pennies resting on said platforms to be trajected therethrough onto said bottom in an attempt to secure a winning score;

That said penny pitch included a transversely disposed bar that could be moved longitudinally over said bottom surface by the operator of the game to sweep pennies from said surface into a chute from

which said pennies were discharged to a suitable receptacle;

That the structure of said penny pitch is the same as the structure of said penny pitch shown on the attached photographs, which photographs are identified as Exhibits "A," "B," and "C," and made a part thereof;

That said bottom and target squares are shown in Exhibit "A" and identified by the numeral 1;

That said side walls of said penny pitch are shown in Exhibits "B" and "C," and identified by the numeral 2;

That said cover of said penny pitch is shown in Exhibits "B" and "C" and identified by the numeral 3;

That said platform of said penny pitch is shown in Exhibits "A," "B," and "C," and identified by the numeral 4;

That said slit-like openings defined by said cover and said platform is shown in Exhibits "A" and "B" and identified [84] by the numeral 5.

/s/ ELLA M. STRIEGEL.

Subscribed and sworn to before me this 16th day of August, 1954.

[Seal]      /s/ ALICE M. McCULLOUGH,  
Notary Public in and for Said  
County and State.

[Endorsed]: Filed October 16, 1954. [85]



[Title of District Court and Cause.]

AFFIDAVIT OF HOMER E. GILLESPIE

State of California,

County of Los Angeles—ss.

Homer E. Gillespie being first duly sworn, deposes and says:

That affiant is the plaintiff in the above-entitled action;

That affiant has read the affidavits of Ella Striegel, Harold A. Ludwig and Basil E. Norris;

That affiant knows of his own knowledge that during the year of 1946 there was located approximately in the center of the Pike extending through the Virginia Park amusement area an open pit, conventional type penny pitch having no transparent cover horizontally disposed across the top thereof, [92] and consisting of a flat playing field raised above the pavement and a fenced-off area surrounding said field;

That during the year of 1946, affiant visited the Pike at the place indicated in the above-named affidavits at least once each month and affiant never saw at the places indicated or any other place the device described in the above-named affidavits;

That affiant left the County of Los Angeles on the 25th day of August on a business trip to San Francisco and the northern part of this state, and did not return to the County of Los Angeles until the 2nd day of October, 1954, when he found at his residence a communication from his attorney advising him to contact his office immediately;

That on the 4th day of October, 1954, affiant contacted his attorney and furnished the information required for the preparation of the pleadings entitled "Response to Request for Admission" and "Answer to Defendant's Interrogatories to Plaintiffs," that he signed said pleadings on the 8th day of October, 1954, and that he was present when defendant's attorneys refused acceptance of a copy thereof;

That affiant has read the affidavit of Coma F. Norris and Victor A. Murray;

That the machine described in the last-named affidavit was placed in operation on the Pike at Long Beach, California, in the summer of 1948, after affiant's machine, embodying the elements of affiant's patent was furnished to defendant, and placed in his place of business during the month of April, 1948;

That defendant has used game devices disclosed in affiant's patent since May 6th, 1952, in the County of Los Angeles, State of California, and before that date, to [93] wit: since the summer of 1948, but not before said date.

/s/ HOMER E. GILLESPIE.

Sworn and subscribed to before me this 16th day of October, 1954.

[Seal]

ERIC A. ROSE,

Notary Public in and for Said  
County and State.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF ERIC A. ROSE

State of California,  
County of Los Angeles—ss.

Eric A. Rose, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiffs in the above-entitled action;

That he has read the affidavit of William C. Babcock, entitled Affidavit in Proof of Admission of Facts, subscribed and sworn to on the 12th day of October, 1954:

That the representations made in paragraph 3 thereof, and each and every part thereof, are false and untrue; [95]

That on the 8th day of October, 1954, commencing at the hour of 10 o'clock a.m., of said day, the deposition of the defendant Coma F. Norris was taken in the office of affiant in the presence of both of his attorneys;

That at the hour of 12:15 p.m., of said day, affiant offered to Mr. Babcock a copy of "Response to Request for Admission" and a copy of "Answer to Defendant's Interrogatories to Plaintiffs" in the presence of plaintiff, defendant, and Mr. Mueller, and requested Mr. Babcock to acknowledge receipt of these copies;

That Mr. Babock refused to receive said copies and refused to acknowledge receipt thereof;

That in view of this refusal affiant caused copies of such pleadings to be mailed to said attorneys for plaintiff on said day, the 8th day of October, 1954, as appears from the affidavit of mailing of Dorothy J. Blanchard on file herein;

That on said 8th day of October, 1954, affiant informed both attorneys for defendant, that plaintiff Homer E. Gillespie had left the County of Los Angeles on a business trip to San Francisco and the northern part of the State of California and did not return to the County of Los Angeles until the 2nd day of October, 1954, as more fully appears from the affidavit of Homer E. Gillespie, concurrently served and filed herewith.

Further affiant sayeth not.

/s/ ERIC A. ROSE.

Sworn and subscribed to before me this 16th day of October, 1954.

[Seal]      /s/ WALTER S. BROWN,  
Notary Public in and for Said  
County and State.

[Endorsed]: Filed October 18, 1954. [96]



[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD NAGEL

State of California

County of Los Angeles—ss:

Edward Nagel, being duly sworn, deposes and says:

That affiant was employed by defendant Coma F. Norris from the day he opened the first Arcade to wit, July 2nd, 1944, to and including November 28th, 1948, as a mechanic with the specific duty to keep the amusement machines in operating condition and to make such repairs as became necessary from time to time;

That affiant is familiar with, and knows, the machine operated by Coma F. Norris, and owned by Homer E. Gillespie during the month of April, 1948, which had a round playing field, vertical walls extending therefrom upwardly, a launching platform, adjacent to the top, a transparent cover forming a slot-like opening with said platform, so that playing pieces could be propelled from the platform through the slot-like [98] opening upon the circular playing field. The playing field employed a circular sweep.

That during the time the Gillespie machine was being operated in the Arcade, to wit: during the month of April, 1948, Coma F. Norris requested affiant to prepare drawings, copying the essential elements of the Gillespie machine, but to use a



rectangular playing field; in accordance with said instructions, affiant prepared said drawings, using the Gillespie machine, and assisted in the developing of the penny pitch machine which was put in operation in the summer of 1948;

That said machine, when returned from the carpenter comprised a rectangular playing field, vertical walls surrounding said playing field, a launching platform adjacent to the top of one long side of said machine and a transparent cover covering said box-like structure and elevated slightly above the launching platform so as to permit playing pieces to be propelled from the launching platform through said slot onto the rectangular playing field.

Affiant knows of his own knowledge and hereby states that no machine embodying a launching platform, a transparent cover, and a slot-like opening between the platform and the cover, was employed, operated, used, stored or exhibited by said Coma F. Norris either in the Arcade, in any place of business operated by him, on the Pike extending through Virginia Park or in any of the storage rooms owned by said Coma F. Norris, or leased or rented by him up to the time affiant constructed the above-described machine.

That during 1946, said Coma F. Norris owned and operated a penny pitch of the conventional type in which a playing field is raised above the pavement and players throw playing pieces onto said playing field from a predetermined distance,

said playing field being surrounded by an open pit [99] into which an operator sweeps the playing pieces at the conclusion of the game;

That during 1946 affiant was charged with servicing the machines owned by said Coma F. Norris and he knows of his own knowledge that no machine was owned, operated or used by said Coma F. Norris during said year which comprised a launching platform, a transparent cover, and a slot-like opening formed between said launching platform and said transparent cover;

That affiant knows of his own knowledge that no such machine was stored in any storage room for machines owned, rented or leased by said Coma F. Norris between 1944 and 1948.

/s/ EDWARD NAGEL.

Sworn and subscribed to before me this 18th day of October, 1954.

[Seal]      /s/ ERIC A. ROSE,

Notary Public in and for Said  
County and State.

[Endorsed]: Filed October 20, 1954. [100]

[Title of District Court and Cause.]

AFFIDAVIT OF ALVIN B. COBBLE

State of California,

County of Los Angeles—ss.

Alvin B. Cobble, being first duly sworn, deposes and says:

That he is employed by the City of Long Beach as a police officer, to wit: Sergeant, and has been employed as police officer of said city since 1936.

That affiant was in charge of the vice squad of the police department of the City of Long Beach from December 1st, 1945, to June of 1949;

That it was one of the duties of affiant to patrol the area known as the Pike extending through Virginia Park; that affiant visited and patrolled said Pike extending through Virginia Park five (5) days each week during the time that he was in charge of the vice squad, to wit: from December 1st, 1945, to June, 1949;

That affiant has inspected Exhibits A, B and C attached to the affidavit of Basil E. Norris;

That no such device was being operated or used on the Pike extending through Virginia Park during the years 1944, 1945 and [102] 1946; that affiant remembers complaints being filed with his department concerning a penny pitch game being operated on the Pike extending through Virginia Park on the ground that such game was a game of chance rather than of skill; that affiant investi-

gated said complaints and inspected a penny pitch game consisting of a platform having a playing field and raised above the ground and a pit surrounding said playing field; that in operation persons would attempt to throw coins from a predetermined distance onto said open playing field and after the conclusion of the game an operator would sweep the coins into the open pit surrounding said playing field; that affiant determined that the game was one of skill rather than chance; that said device was being operated at that time on the Pike in the area extending through Virginia Park; that said game had no transparent cover, had no launching platform from which coins could be trajected onto said playing field and did not have a slot-like opening through which such coins could be trajected onto the playing field;

That the above-stated matters are within the knowledge of affiant and are not based upon information or belief.

/s/ ALVIN B. COBBLE.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal]      /s/ ERIC A. ROSE,

Notary Public in and for Said  
County and State.

Receipt of copy acknowledged. [103]

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the parties to the above-entitled action through their respective attorneys:

That the attached exhibit is a true and correct copy of Patent No. 2,595,669 issued to Homer E. Gillespie on May 6, 1952.

It Is Further Stipulated that said copy may be used with the same force and effect in all proceedings in the above-entitled action as if it were the original patent grant.

Dated this 26th day of October, 1954.

ERIC A. ROSE and  
ALBERT D. WHITE,

By /s/ ERIC A. ROSE,  
Attorneys for Plaintiff.

WILLIAM C. BABCOCK and  
FREDERICK E. MUELLER,

By /s/ FREDERICK E. MUELLER,  
Attorneys for Defendants.

It is so ordered, November 3, 1954.

/s/ WM. C. MATHES,  
Judge.

[H. E. Gillespie Patent No. 2,595,669 is set out in full, pages 89 to 98 of the Book of Exhibits.]

[Endorsed]: Filed November 3, 1954. [105]



[Title of District Court and Cause.]

AFFIDAVIT OF VICTOR A. MURRAY

State of California,

County of Los Angeles—ss.

Victor A. Murray being duly sworn, deposes and says:

That during the year 1946 affiant was in the business of doing cabinet work and other carpentering as an independent operator in the City of Long Beach, State of California;

That affiant has read an affidavit made by Edward Nagel dated October 18, 1954, that was filed in connection with the above-identified case;

That on or about the 1st day of March, 1946, Coma F. Norris approached affiant and requested that he build a penny pitch, which Mr. Norris informed affiant would be used on The Pike in Long Beach, California;

That prior to constructing said penny pitch, as set forth in affiant's affidavit dated August 19, 1954 filed herein, affiant personally called upon Mr. Norris at his place of business at [116] 333 West Pike, Long Beach, California, at Mr. Norris' request in order that Mr. Norris could explain and outline to affiant the details of construction and operation of said penny pitch, and at which time Mr. Norris made drawings of said penny pitch in affiant's presence disclosing the structure thereof which Mr. Norris desired incorporated therein.

which drawings affiant subsequently used in constructing said penny pitch;

That at no time has affiant received or been supplied with drawings, sketches, or any other descriptive material whatsoever relating to amusement devices, which were prepared by one Edward Nagel, nor has said Edward Nagel at any time ever assisted affiant in the development of or actual construction of an amusement device of any nature, whatsoever, penny pitch, or otherwise.

/s/ VICTOR A. MURRAY.

Subscribed and sworn to before me this 2nd day of November, 1954.

[Seal]      /s/ ALICE M. McCULLOUGH,  
Notary Public in and for Said  
County and State.

My Commission Expires June 17, 1957.

[Endorsed]: Filed November 15, 1954. [117]

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[Title of District Court and Cause.]

### AFFIDAVIT OF COMA F. NORRIS

State of California,  
County of Los Angeles—ss.

Coma F. Norris being duly sworn, deposes and says:

That affiant has read the affidavit filed herein and sworn to by one Edward Nagel on October 18, 1954;

That affiant knows that statements made in said affidavit are completely untrue and without foundation;

That said Edward Nagel was employed by affiant from July 6, 1944, through November 28, 1948, in the capacity of a mechanic to repair amusement device maintained by affiant at his place of business located at 333 West Pike, Long Beach, California;

That affiant discharged said Edward Nagel due to the fact that Mr. Nagel not only failed to maintain said machines in good repair, but also became increasingly arrogant, insolent and surly in his employee relationships with affiant and affiant's other employees as well as toward affiant's customers, and during [130] his last of year of employment by affiant, developed a markedly indolent attitude regarding the duties for which he was responsible and was hired to do;

That at no time did affiant ever request or even suggest that said Edward Nagel make a drawing of the Homer E. Gillespie machine during the month of April, 1948, when affiant permitted said Gillespie to try out his machine in said affiant's place of business, nor did affiant request said Nagel, nor did said Nagel at any time do any development work for affiant on a penny pitch machine of any nature whatsoever;

That the drawing from which Victor A. Murray, a carpenter employed by affiant, built affiant's

penny pitch, was prepared by affiant in said Murray's presence, and said Edward Nagel's sworn statement pertaining to the preparation of said drawing is completely false and has no basis of fact;

That at no time during the period in which Edward Nagel was employed by affiant, did affiant disclose any details of his business affairs to said Nagel, nor did said Nagel have access to affiant's books or confidential reports, whereby said Nagel could obtain accurate knowledge of equipment purchased or sold by affiant other than that maintained in affiant's said place of business; nor did affiant furnish said Nagel with any information pertaining to equipment leased by affiant other than that equipment maintained in his said place of business, nor did affiant inform said Nagel as to what equipment was stored by affiant other than that which was removed from affiant's said place of business on The Pike;

That in carrying out his duties as a mechanic in affiant's employ said Nagel could not possibly have acquired sufficient knowledge to enable him to truthfully make the statements contained on Page 2, lines 19-27, and Page 3, lines 3-8, of his affidavit dated October 18, 1954, filed herein, which statements [131] as borne out by the true facts sworn to herein are nothing more than Mr. Nagel's personal opinion, or rumors and hearsay that he may have picked up during the last year of his employment by affiant;



That in actual fact, said Nagel had no knowledge other than opinion as to the subject matter contained on Page 2, in lines 19-27, and Page 3, lines 3-8, of his affidavit executed October 18, 1954.

/s/ COMA F. NORRIS.

Subscribed and sworn to before me this 2nd day of November, 1954.

[Seal]     /s/ ALICE M. McCULLOUGH,  
Notary Public in and for said  
County and State.

My commission expires June 17, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1954. [132]

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[Title of District Court and Cause.]

ORDER ON DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

This cause having come before the Court for hearing on defendants' motion, filed October 16, 1954, for a summary judgment of dismissal on the merits, and the motion having been argued and submitted for decision; and it appearing to the Court:

(1) that there is no genuine issue of fact as to the contents of either the Letters Patent No. 2,595,669 in suit or the "file wrappers" reciting



the Patent-Office proceedings leading to the issuance thereof;

(2) that there is no genuine issue of fact [153] as to the existence or contents of prior-art patent No. 725,684 issued April 21, 1903, to Dorsey, or of prior-art patent No. 2,160,349 issued May 30, 1939, to Andrews;

(3) that assuming all facts in issue to be as plaintiffs contend them to be, no trier of fact could reasonably find that the device described in any of the claims in suit of Letters Patent No. 2,595,669 is either new or the result of invention or discovery [35 U.S.C. §§ 100, 101, 102]; and

(4) that defendants are entitled to a finding, based upon the uncontradicted evidence, that the claims in suit of Letters Patent No. 2,595,669 are invalid for want of invention [see *Jaccuzi Bros. v. Berkeley Pump Co.*, 191 F. 2d 632, 634 n.4, 637 (9th Cir. 1951)], and to judgment as a matter of law dismissing plaintiffs' action for infringement upon the merits [cf. *Park-In Theatres v. Perkins*, 190 F.2d 137, 142 (9th Cir. 1951); *Steigleder v. Eberhard Faber Pencil Co.*, 176 F.2d 604 (1st Cir.), cert. denied, 338 U.S. 893 (1949)];

It Is Ordered that defendants' motion for summary judgment is hereby granted, and that defendants lodge with the Clerk within ten days findings of fact, conclusions of law and judgment of dismissal on the merits, to be settled pursuant to local rule 7.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

December 16, 1954.

/s/ WM. C. MATHES,  
United States District Judge.

[Endorsed]: Filed December 16, 1954. [154]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on Motion of Defendants for Summary Judgment, and the Court having considered the pleadings and papers on file herein, finds the facts and states the Conclusions of Law as follows:

### Findings of Fact

(1) That there is no genuine issue of fact as to the contents of either the Letters Patent No. 2,595,669 in suit, or the "file wrappers" reciting the Patent Office proceedings leading to the issuance thereof.

(2) That there is no genuine issue of fact as to the existence [155] or contents of prior art patent No. 725,684, issued April 21, 1903, to Dorsey,

or of prior art patent No. 2,160,349, issued May 30, 1939, to Andrews.

(3) That neither of the prior art patents mentioned in Paragraph 2 hereof was cited in the Patent Office proceedings leading to the issuance of said Letters Patent No. 2,595,665 in suit.

### Conclusions of Law

(1) That Claims 1, 2, 3, 11, 12, 13 and 14 of said Letters Patent in suit are clearly invalid for the reasons that the device described in each of said claims is not new and is totally lacking in invention.

(2) Claims 1, 2, 3, 11, 12, 13 and 14 of said Letters Patent in suit are clearly invalid for the reason that the invention of the device described therein was patented in the United States more than one year prior to the date of application for said Letters Patent in suit.

Dated December 30, 1954.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged December 27, 1954.

[Endorsed]: Filed December 30, 1954. [156]

In the District Court of the United States, Southern District of California, Central Division

Civil Action No. 16,858-WM

HOMER E. GILLESPIE, CATHERINE L. GILLESPIE, GILLESPIE GAMES COMPANY, a California Corporation,

Plaintiffs,

vs.

COMA F. NORRIS, Individually and Doing Business as C. F. NORRIS MANUFACTURING COMPANY; DOE ONE, DOE TWO, DOE THREE, DOE FOUR and DOE FIVE,

Defendants.

### JUDGMENT FOR DEFENDANTS

This cause having come on to be heard on Motion of Defendants for a Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action and all of the papers on file herein and all of the affidavits submitted in support of and in opposition to Defendants' Motion, and having heard oral argument, and having found that there is no genuine issue of fact to be submitted to the trial court,

And the Court having made an order granting Defendants' Motion for Summary Judgment and to Dismiss this action on the [158] merits, it is hereby

Ordered, Adjudged and Decreed That:

1. United States Letters Patent No. 2,595,669 issued May 6, 1952, to Gillespie Games Company, Long Beach, California, a California corporation, is invalid as to Claims 1, 2, 3, 11, 12, 13 and 14 thereof.

2. This action is hereby dismissed on the merits and that Defendants recover their costs to be taxed by the clerk.

Costs taxed at \$176.23.

Dated December 30, 1954.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged December 27, 1954.

[Endorsed]: Filed and entered December 30, 1954. [159]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Homer E. Gillespie, Catherine L. Gillespie, and Gillespie Games Company, a California corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final



judgment entered in this action on the 30th day of December, 1954.

ERIC A. ROSE and  
ALBERT D. WHITE,

By /s/ ERIC A. ROSE,

Attorneys for Appellants Homer E. Gillespie,  
Catherine Gillespie, Gillespie Games Company,  
a California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1955. [161]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 172, inclusive, contain the original Complaint; Answer; Answer to Counterclaim; Request for Jury; Defendants' Interrogatories to Plaintiff; Request for Admission of Facts; Answer to Defendants' Interrogatories to Plaintiffs; Response to Request to Admission; Motion for Summary Judgment or to Dismiss; Affidavit in Proof of Admission of Facts; Affidavit of Harold A. Ludwig; Affidavit of Victor A. Murray filed Oct. 16, 1954; Affidavit of Basil E. Norris; Affidavit of Coma F. Norris filed Oct. 16, 1954; Affidavit of Ella Striegel; Affidavit of Kenneth J. Martinson;

Affidavit of Homer E. Gillespie and Eric A. Rose; Affidavit of Edward Nagel; Affidavit of Alvin B. Cobble; Stipulation; Affidavit of Bob R. Smits; Affidavit of Victor A. Murray, filed Nov. 15, 1954; Affidavit of Wesley Crowther; Affidavit of Coma F. Norris filed Nov. 15, 1954; Affidavit of John Aldridge; Affidavit of George Cowin; Affidavit of Kay Cowin; Order on Defendants' Motion for Summary Judgment; Findings of Fact and Conclusions of Law; Judgment for Defendants; Notice of Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal; which, together with a full, true and correct copy of the Docket Entries herein, and the original Plaintiffs' Exhibits 1, 2 and 3, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 28th day of February, 1955.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No 14674. United States Court of Appeals for the Ninth Circuit. Homer E. Gillespie, Catherine L. Gillespie and Gillespie Games Company, a Corporation, Appellants, vs. Coma F. Norris, Individually and Doing Business as C. F. Norris Manufacturing Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 1, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 14674

HOMER E. GILLESPIE, CATHERINE L.  
GILLESPIE, GILLESPIE GAMES COM-  
PANY, a California Corporation,

Appellants,

vs.

COMA F. NORRIS, Individually and Doing Busi-  
ness as C. F. NORRIS MANUFACTURING  
COMPANY, et al.,

Respondent.

STATEMENT OF POINTS ON APPEAL

Pursuant to the provisions of Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellants state the following points upon which they will rely on appeal:

1. The evidence is insufficient to support the findings of fact or judgment.

2. That the Court failed to make findings of fact on material issues.

3. That as a matter of law the Court erred in granting defendants' motion for summary judgment, based upon the affidavits submitted in support of the motion and those filed in opposition

thereto, and upon copies of letters patent No. 2,595,669 in suit, as well as copies of letters patent No. 725,684 issued on April 21, 1903, to Dorsey, and patent No. 2,160,349 issued May 30, 1939, to Andrews.

Appellants hereby designate the following record to be printed:

\* \* \*

Dated this 7th day of March, 1955.

/s/ ERIC A. ROSE,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1955.



[Title of Court of Appeals and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between the Appellants and Respondent in the above-entitled action, through their respective attorneys, that Exhibits A, B, and C attached to the Affidavit of Victor A. Murray, dated August 13, 1954, are the same exhibits, with corresponding lettering, attached, respectively, to Defendants' Interrogatories to Plaintiff, and the Affidavits of Ella Striegel, Harold Ludwig and Basil A. Norris, and that such exhibits need not be printed for said last-named affidavits.

Dated this 7th day of March, 1955.

/s/ ERIC A. ROSE,

Attorney for Appellants.

WILLIAM C. BABCOCK and  
FREDERICK E. MUELLER,

By /s/ FREDERICK E. MUELLER,

Attorney for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed March 8, 1955.